Federal Energy Regulatory Commission
October 19, 2006
Open Commission Meeting
Statement of
Commissioner Jon Wellinghoff

Mobile-Sierra Doctrine Statement

"The parties to the ICT Agreement have asked the Commission to apply the "public interest" standard of review if and when it considers requests from any of those parties to change the Agreement in the future.1 The parties have also asked the Commission to apply the "public interest" standard when such changes are sought by either a non-party to the Agreement through a complaint or the Commission acting sua sponte.

In its original order approving the ICT Agreement,2 which issued prior to my becoming a Commissioner, the Commission did not comment on or explain why it was appropriate to apply the "public interest" standard in the circumstances sought by the parties, rather than retaining the "just and reasonable" standard of review for prospective contested changes to the Agreement. I believe that the particular facts of this case warrant the Commission agreeing to apply the "public interest" standard when it considers such changes to the Agreement. In light of the importance of this issue, I want to take this opportunity to explain how I reached that conclusion.

The Federal Power Act and the Natural Gas Act require that rates, terms, and conditions of service must be "just and reasonable" and not unduly discriminatory or preferential.3 There is little dispute that the Commission's initial review of an agreement is conducted under the "just and reasonable" standard.4 Similarly, there is little dispute that the parties to an agreement should be able to expressly prescribe the standard of review for future disputes over the agreement as between or among the parties to that agreement. Thus, the parties to an agreement may request that the Commission use the "public interest" standard, which is generally viewed as higher or stricter than the "just and reasonable" standard,5 in reviewing proposed changes to their agreement that are contested between or among the parties at some future time after the agreement is initially approved by the Commission.

Other circumstances, however, present more difficult policy decisions for the Commission. These include what standard of review should apply when the parties to an agreement fail to expressly state the standard of review that should apply when the Commission considers future contested changes to the agreement. Difficult questions of policy also arise when the parties to an agreement ask the Commission to apply the "public interest" standard when it considers changes sought by either a non-party to an agreement or the Commission acting sua sponte.

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[1] The "public interest" standard of review and the related *Mobile-Sierra* doctrine stem from the U.S. Supreme Court's rulings in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[2] *Entergy Services Inc.*, 115 FERC ¶ 61,095 (April 24, 2006 ICT Order), *errata notice* May 4, 2006, *order on reh'g*, 116 FERC ¶ 61,275 (2006) (ICT Rehearing Order).

[3] 16 U.S.C. § 824d; 15 U.S.C. §717c.

[4] *See, e.g.*, *Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 283-86 (D.C. Cir. 2006).

[5] *See, e.g., Standard of Review for Modifications to Jurisdictional Agreements*, Notice of Proposed Rulemaking, 113 FERC ¶ 61,317 at P 4 (2005) (citing *Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983)).

Case law on the applicability of the "public interest" standard is not entirely clear and is, in fact, inconsistent.[6] Indeed, the courts have noted that "[w]hether and when Mobile-Sierra applies in varying contexts is going to remain in confusion" until the Commission establishes a clear policy.[7] The courts have further suggested that the Commission need not tolerate the "public interest" standard at all and could require prospectively that all contracts be subject to the "just and reasonable" standard.[8]

Given this uncertainty in case law, I believe that the Commission should set a clear policy on these issues. That policy should strive to strike a balance between recognizing contracting parties' needs for certainty with respect to their agreements and protecting the interests of energy consumers. An agreement, by its terms, may affect not only the rights and interests of the parties thereto, but also the rights and interests of others, as well as the operation of markets that shape rates, terms and conditions of service within the Commission's jurisdiction. Therefore, the Commission's determination as to whether and when it will agree to apply the "public interest" standard to future changes to an agreement sought by non-parties or the Commission acting sua sponte should not be limited to a consideration of the rights and interests of the contracting parties alone.

To strike the proper balance, I would first require parties to include specific language in an agreement if they intend to ask the Commission to apply the "public interest" standard with regard to future changes sought by any or all of a party, non-party, or the Commission acting sua sponte. Thus, unless specific language appeared in an agreement, the Commission would apply the "just and reasonable" standard to future changes. This approach reflects my belief that as a general matter, retaining the right to future review under the "just and reasonable" standard enables the Commission to more effectively fulfill its statutory mandate under the FPA and the NGA.

The "just and reasonable" standard is not new; it is well-known and well-defined. The electric and gas industries have operated and thrived under this standard for seven decades, during which it has served the Commission well as a tool to protect the interests of consumers. The Commission should not surrender this important tool absent a compelling factual and policy basis for doing so.

I reject the argument, made by some advocates of broad use of the "public interest" standard, that the "just and reasonable" standard is antithetical to the principle of sanctity of contract and fails to promote certainty and stability in energy markets. Past precedent demonstrates that the Commission recognizes the importance of sanctity of contract and that the Commission uses the "just and reasonable" standard judiciously in considering contract modification. In Order No. 888, for example, the Commission made precisely these points and indicated that an entity "has a heavy burden in demonstrating that the contract ought to be modified" even under the "just and reasonable" standard.[9]

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[6] *See, e.g.*, *Boston Edison Co. v. FERC*, 233 F.3d 60, 67 (1st Cir. 2000) (stating that even cases within the D.C. Circuit "do not form a completely consistent pattern").

[7] *Id.* at 68.

[8] *Id*.

[9] Order No. 888 at 31,665.

Second, where the parties to an agreement ask the Commission to apply the "public interest" standard to future changes to sought by non-parties or the Commission acting sua sponte, I would require the parties to demonstrate by substantial evidence that a factual and policy basis supports their request. In particular, I believe that the Commission should only grant such requests in narrowly proscribed circumstances where substantial evidence affirmatively demonstrates that the contract or agreement has broad-based benefits to both parties and non-parties. In making this assessment, I would take into consideration, among other issues: (1) whether the contract or agreement was negotiated through a stakeholder process reflecting a wide range of interests, (2) whether state commissions had meaningful opportunity to participate in the stakeholder process, (3) the extent of and justification for opposition to the request for the Commission to apply the "public interest" standard; and (4) whether granting the request is necessary to the resolution of the proceeding. Requiring a showing of broad-based benefits, supported by substantial evidence, is an appropriate condition precedent to the Commission granting such a request because the term "public interest" implies interests beyond and distinct from those of the contracting parties.

Third, it is important to recognize that the Mobile-Sierra doctrine assumes that agreements are entered into voluntarily. The courts have stated that "the purpose of the Mobile-Sierra doctrine is to preserve the benefits of the parties' bargain as reflected in the contract, assuming that there was no reason to question what transpired at the contract formation stage."10 Therefore, the standard of review that applies to prospective contested changes to an agreement – whether it be the "just and reasonable" standard or the "public interest" standard – does not affect the ability of a party, or the Commission acting sua sponte, to seek to make that agreement void (e.g., on the basis of fraud, mistake, misrepresentation, duress, or undue influence).

Applying these standards to the facts of this case, I believe that it is appropriate for the Commission to agree to apply the "public interest" standard when it considers future changes to the ICT Agreement sought by parties, non-parties, and the Commission acting sua sponte. Concerns about transmission access on the Entergy system have been extensive and persistent. The ICT proposal, as modified by the Commission, promises to alleviate such concerns and significantly improve access to transmission service.

Since 2002, the Commission, state regulators, and market participants have worked with Entergy to improve access to transmission service on Entergy's system.11 The first attempt toward that end was the Generator Operating Limits (GOL) proposal. However, significant errors in Entergy's use of the GOL methodology did not permit the Commission or market participants to determine whether available transmission capacity was being restricted or withheld from independent power producers and

[10] *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002) (citing *Town of Norwood v. FERC*, 587 F.2d 1306, 1312 (D.C. Cir. 1978)). *See also PacifiCorp v. Reliant Energy Services, Inc.*, 105 FERC ¶ 61,184 at P 55 (2003) ("All three cases [cited by PacifiCorp] recognize that *Mobile-Sierra* preserves the parties' bargain as reflected in the contract, when there is no need to question what transpired at the contract formation stage. Our decision here is consistent with those cases, as there has been no showing of fraud, duress, or the exercise of market power at the contract formation stage.").

[11] *See* April 24, 2006 ICT Order at P 4-21; ICT Rehearing Order at P 2-7.

other generators that use transmission service. The next attempt was the Available Flowgate Capability (AFC) proposal. Again, implementation errors led to numerous claims by customers of loss of access to transmission, lack of transparency, and data reliability problems.

The ICT proposal marks the third, and a significantly different, attempt to improve access to transmission service on Entergy's system. The ICT appears to have sufficient authority to independently and fairly grant or deny transmission service, perform necessary feasibility and system impact studies, administer Entergy's OASIS, and ensure that the terms of Entergy's OATT are administered in a nondiscriminatory manner. In particular, having an independent entity oversee and evaluate Entergy's AFC process and verify Entergy's data, and requiring Entergy to report any disagreements it has with the ICT over proposed modifications to the AFC process, will provide transparency to Entergy's transmission program. The ICT is also required to develop and chair a stakeholder process that will provide safeguards for continued nondiscriminatory access to transmission service, as well as a forum for further improvements.

In addition, several of Entergy's retail regulators were parties to the Commission's proceeding on the ICT Agreement, and the Commission took their comments, as well as the comments of other parties, into account when making its determinations. Consideration of those comments was entirely appropriate and helped the Commission in reaching its conclusion that Entergy's ICT proposal, as modified, is just and reasonable and consistent with or superior to the Commission's pro forma OATT.

Taking all of these factors into account, I believe that it is appropriate for the Commission to grant the request of the parties to the ICT Agreement, and to apply the "public interest" standard when it considers future changes to the ICT Agreement sought by parties, non-parties, and the Commission acting sua sponte.

For these reasons, I respectfully concur with the Commission's order."